



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Air Force--Reconsideration of
Protest filed by Motorola, Inc.

File: B-222181.2

Date: November 10, 1986

DIGEST

1. Where technical literature included in offer shows noncompliance with solicitation's minimum technical requirements, the subsequent submission by the offeror of a blanket statement of compliance is not sufficient to make the offer compliant.
2. Agency's argument that its own product test results justify acceptance of a product notwithstanding technical literature showing product's noncompliance with minimum technical requirement is rejected where tests were essentially field tests which did not address compliance with this minimum requirement.
3. Protester had a substantial chance of receiving award where technical data submitted with its offer showed compliance with solicitation's minimum technical specifications and its offer was next low after a noncompliant offer. Therefore, prior decision that protester is entitled to costs of preparing proposal is affirmed.
4. Where agency argued in initial protest that specifications were not relaxed, it cannot properly argue on reconsideration that protester is not entitled to costs of preparing proposal because specifications were in fact improperly relaxed and protester did not have substantial chance of receiving award.
5. Prior decision is affirmed on reconsideration where requester has not shown any error of law or fact that would warrant reversal of that decision.

DECISION

The Department of the Air Force requests reconsideration of our decision in Motorola, Inc., B-222181.1, July 11, 1986, 86-2 CPD ¶ 59. In that decision, we sustained Motorola's protest that the agency had improperly relaxed the

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specifications under request for proposals (RFP) No. F24604-85-B-A015 in order to accept the low noncompliant proposal submitted by California Mobile Communications (CMC). Because the improperly awarded contract had already been fully performed and because we found that Motorola would have had a substantial chance of receiving the award if the specifications had been properly applied, we granted reimbursement of Motorola's costs of preparing its proposal and of filing and pursuing the protest.

The Air Force believes our decision was based in part on errors of fact and requests reconsideration. We affirm our prior decision.

The protest involved the procurement of portable radios to be used by security police on Malmstrom Air Force Base. The specifications called for portable radios with a minimum power output of 5 watts and with FM noise of -60 db. Under "additional specifications," the solicitation required that the radios meet or exceed procedures under "Mil. Spec. 810 D" and that they be "Factory Mutual certified for nonincendiary devices (Class I, Div. 2, Gps. A, B, C, and D) and intrinsically safe (Class I and II, Div. 1 and 2, Gps. C, D, E, F, and G)." At the conclusion of the specifications there appeared a caveat that "[t]he above item descriptions are approved as a minimum requirement, necessary to insure operability of radio transceivers." The RFP was later amended to change the FM noise requirement to -55 db, and the Mil. Spec. from 810 D to 810 C.

The RFP requested that technical literature be submitted with proposals, and both CMC and Motorola complied. Published technical specifications prepared by CMC's supplier, Transworld, and included in CMC's offer indicated that the radio offered by CMC was approved as intrinsically safe for Groups D, E, and G and as nonincendive for Groups A, B, C, and D, as required, but not intrinsically safe for Groups C and F. This discrepancy was revealed in documents included in the agency report on the protest but was not addressed. When we contacted the agency for clarification of these requirements, we were advised that the various requirements for Factory Mutual certification were based on National Electrical Code definitions, and that under the code, the terms "intrinsically safe" and "nonincendiary" were interchangeable, for purposes of this requirement. The Air Force now objects that this argument was not made in its administrative report and that it was not the basis for the agency's acceptance of CMC's offer. Rather, the agency now argues that "[t]he main basis for the contracting officer's decision concerning compliance with the Electrical Code was not the original

literature submitted in the RFP . . . but was the subsequent certification of compliance received by CMC after they were identified as the low offeror in price." The Air Force argues that the contracting officer properly relied on the certification in making his award decision.

A blanket offer of compliance by an offeror is not an adequate substitute for detailed and complete technical information in a proposal establishing that what it proposes will meet the government's needs. McKenna Surgical Supply, Inc., 56 Comp. Gen. 531 (1977), 77-1 CPD ¶ 261; Falcon Systems, Inc., B-214562, Sept. 10, 1984, 84-2 CPD ¶ 270; AEG Aktiengesellschaft, B-221079, Mar. 18, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 267.

Here, the "certification" cited by the Air Force is, in our view, simply a blanket statement of compliance. The agency refers to a cable or telex from the distributor for the Transworld radio, sent to the buyer for this procurement at Malmstrom Air Base. The cable states:

"We hereby certify that the Transworld Model PR60A-15 Factory Mutual Approved, intrinsically safe radio, will meet all of the original specifications contained in the solicitation except that a mercury battery pack is not available."

This "certification" does not refer to any test results or to Factory Mutual approval in the specific areas required under the RFP, nor does it explain its basis for contradicting the printed technical data requested by the RFP and contained in CMC's proposal. CMC has not, for example, indicated that its standard radio would be appropriately modified to meet the intrinsically safe standard, nor has it specified the manner which any modification would be accomplished. Moreover, we do not agree with the agency's argument that the combination of the technical literature and the general statement of compliance should have been enough to demonstrate compliance with the minimum requirements of the RFP where the technical literature indicates that the offered radio does not meet all of the requirements.

In an internal memo dated Nov. 25, 1985, included in the agency report, the Air Force buyer noted that "[t]he only difference on the specs from Transworld is FM Noise 50db on transmitter spec sheet, to the [Mil Spec] 810C 55db requested . . . [CMC's general manager] assured us that it met the 55db and he will provide backup to this [The Air Force's technical representative] checked the rest of

the specs and told me that the specifications as on the brochure are 810c standard, but he would like to see a field test performed." The blanket statement of compliance was submitted December 4, apparently in response to the agency's concern about the 50db/55db discrepancy. There is no indication in the record that the agency ever questioned the discrepancy between the intrinsically safe requirements in the RFP and the representations in CMC's technical data. Therefore, even if an offeror's statement of compliance were acceptable as a means of supporting otherwise incomplete technical data, we could not find, here, that Transworld's submission cured the problem of noncompliance with the intrinsically safe requirements. It is for precisely this reason that a blanket statement is unacceptable; it provides no assurance, particularly where precise technical specifications are involved, that the proposed product will meet all of the requirements specified in the solicitation. Accordingly, we affirm our previous decision that in these circumstances, the subsequently submitted statement of compliance did not cure the deficiency apparent from CMC's technical literature.

The agency also argues that "the testing of CMC's radio verifies that it does in fact meet all of the specification requirements." The only evidence of any tests in the record is a "Products Evaluation" report based on field testing conducted by Air Force personnel. The field testing involved the use of the radio over a 2-week period "under normal operating conditions" to determine whether the radio would meet the agency's needs. There is no indication that any technically sophisticated testing was conducted to determine whether the radio met the National Electrical Code definitions of "intrinsically safe" or "nonincendiary" in the various locations or atmospheres specified in the RFP as minimum requirements. In fact, the field test results show that the Transworld radio supplied by CMC generally worked well with some minor problems but specifically do not show that the users were made aware of, or tested equipment to see if it met, the nonincendive or intrinsically safe requirements. We do not believe that the testing was sufficient to justify acceptance of the CMC proposal in spite of the technical literature which showed noncompliance. In these circumstances, we affirm our previous finding that the Air Force improperly determined that the CMC proposal met all of the minimum requirements in the RFP. See Emerson Electric Co., B-212649, Nov. 4, 1983, 83-2 CPD ¶ 529.

The Air Force also challenges our determination that Motorola is entitled to reimbursement of the costs of preparing its proposal and of filing and pursuing its protest. The agency

argues that we erred in finding that Motorola had a substantial chance of receiving the award but was unreasonably excluded from the competition.

At the outset, we point out that this standard (requiring the protester to have had a substantial chance of receiving the award) applies only to the issue of proposal preparation costs. See EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 85-2 CPD ¶ 362. We therefore consider our determination that Motorola is entitled to recover the costs of filing and pursuing the protest unchallenged.

The agency argues that there was never any showing that Motorola would have been in line for award; that Motorola's offer was higher in price and technically inferior to CMC's; and that no award would have been made to either offeror if the specifications had not been relaxed.

In our initial decision, we noted that the RFP required the radios to have a 5-watt power output and that there was technical disagreement about whether the wattage was to be measured before or after the radio was modified to be intrinsically safe. The radio offered by CMC, already in the intrinsically safe mode, measured 4.5 watts. Motorola's radio was initially 5 watts, but was only 2 watts when modified to be intrinsically safe. The Air Force had argued that it was commonly known that the addition of the intrinsically safe feature reduces wattage and that "the minimum power output of 5 watts as stated in the specifications is not as explicit as it could be."


The agency in its report on the protest did not specifically state that the wattage was to be measured before the radio was modified to be intrinsically safe. However, it rebutted Motorola's charge that the specifications had been relaxed to permit acceptance of CMC's 4.5-watt radio by pointing out that this radio was also available in an unmodified model, and that model's power output was 5 watts. We believed the only conclusion to be drawn from this argument is that the agency was applying the specifications by measuring the wattage of these radios prior to their modification. We reasoned that, since the agency had not revealed to offerors any range within which a reduction in power would be acceptable, both the 4.5-watt radio and the 2-watt radio would meet the RFP's wattage requirement as written.

Our decision held that Motorola was entitled to rely on the RFP as indicating the Government's actual minimum needs and that it had a substantial chance of receiving the award based upon the specifications stated in the RFP. The argument that Motorola's offer was higher in price than or technically

inferior to CMC's offer is irrelevant, since CMC's offer was technically noncompliant with the RFP's "intrinsically safe" requirement and could not properly be considered for award under the RFP's stated minimum requirements. The technical data provided with Motorola's bid showed compliance with the minimum specifications in the RFP, and it was next in line for award after CMC.

In arguing that no award could have been made to either offeror if the specifications had not been relaxed, the Air Force contradicts its initial position, i.e., that wattage was to be measured before the intrinsically safe feature was added and that this requirement had not been relaxed. However, we have held that parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. See Western Wood Preservers Institute--Reconsideration, B-203855.8, Jan. 9, 1985, 85-1 CPD ¶ 29. Here, the Air Force's position during the protest was, in essence, that the specifications had not been relaxed. It cannot now properly argue that the specifications were, in fact, improperly relaxed, and that Motorola would not be in line for award because such award would require the specifications to be relaxed. This argument should have been raised by the Air Force, if at all, during our initial consideration of the protest.

In order to prevail in a request for reconsideration, the requester must convincingly show either errors of fact or of law in our earlier decision. Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13 at 2. We do not find that the Air Force has met this standard. Accordingly, our prior decision is affirmed.

for 
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of the United States